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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 970

ABRAHAM FISHGOLD,

Appellant,

vs.

SULLIVAN DRYDOCK & REPAIR CORPORATION,

Appellee,

ROY GRANATA, ETC.,

Intervenor-Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMERICAN FEDERATION OF LABOR, AMICUS CURIAE

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BRIEF OF AMERICAN FEDERATION OF LABOR, AMICUS CURIAE

Argument

The American Federation of Labor has asked and received permission from the parties to this cause to file a brief *amicus curiae.*

The principal issue in this case is whether Section 8 of the Selective Training and Service Act confers upon returning veterans an absolute priority or superseniority reemployment right to the particular job which the veteran left when he entered the Armed Services, even to the exclusion of other employees with greater seniority. The Gov-

ernment, appearing on behalf of the veteran in this case, contends that such superseniority exists, not only in respect to the right of reemployment in the first instance, but in respect to the right to remain on the job for a year period following such reemployment. The interpretation placed upon Section 8 by the Government would operate to wreck existing seniority practices as established under thousands of collective bargaining agreements in effect between employers and numerous labor organizations affiliated with the American Federation of Labor. Because of this and because of the disruptive consequences inevitable under an adoption of the interpretation placed upon Section 8 by the Government, the American Federation of Labor has a very real and a very urgent interest in presenting its views concerning the proper construction of Section 8. The American Federation of Labor had instituted a suit before Judge Charles G. Briggle, United States District Judge for the Southern District of Illinois, Southern Division, for the purpose of securing an interpretation of Section 8, in an action entitled "*Olin Industries, Inc., v. Joseph Barnett, et al.*" (decided January 24, 1946). That Court upheld the contentions of the American Federation of Labor in the first decision to deny the so-called "superseniority interpretation" of the Director of Selective Service. That case is now being appealed to the Seventh Circuit. However, it appears that the principal issue therein will be determined by this Court in the instant case prior to the time that the *Olin* case can be presented to this Court, and for that further reason the American Federation of Labor desires to present its views in the present action.

Section 8 Does Not Confer Any Absolute Priority or Superseniority Reemployment Right But Merely Restores the Veteran to the Same Relative Position He Would Have Occupied Had He Never Entered the Armed Services

The position of the American Federation of Labor in respect to the superseniority issue and the proper construction of Section 8 is this: The Congress undertook under Section 8 to protect the returning veteran against any economic penalty he might have suffered because of his service in the armed forces, and to this end the veteran was given the right to be returned to the job *status quo* he would have had had he never entered the services, without loss of seniority or other benefits that would otherwise have been his. The Government in this case, as well as the Director of Selective Service in his memorandum 190-A; contend that Section 8 confers rights of seniority in addition to those which he would have had had he never been inducted, and that the returning veteran has an absolute right to the particular job he left, if still available, regardless of whether a person with greater seniority is thereby displaced. In other words, the Government asserts that returning veterans are entitled to be returned to and retained on their jobs even though the total seniority of the veteran who seeks to displace a non-veteran, including all time spent in the Armed Services, is less than that of the non-veteran. The non-veterans assert that the veterans are entitled to be credited with all time spent in the service of their country just as if they had never left their jobs, but are entitled to no greater credit and to no higher rights. If the Selective Training and Service Act does not confer any right of superseniority, then it follows that the Government's contentions must fall. It is the purpose of this brief to demonstrate that Section 8 of the Act does not confer any

such right, and that Congress did not intend, nor could it have intended, to confer any such right.

Under accepted rules of statutory construction, Congressional intent can be ascertained in three ways: First and most conclusively, by the language of the Act itself—the so-called internal evidence; second, by the legislative history of the law, the external evidence; and third, by consideration of the results obtainable under the superseniority interpretation—results which, as will be seen, could hardly have been intended in the absence of specific language clearly compelling such results.

1. The Language of the Act

The Act declares that wherever a returning veteran otherwise meeting the requirements of the statute

> "has left or leaves a position, other than a temporary position, in the employ of any employer" (Section 8(b)),

then the employer in question, on receipt of appropriate application,

> "shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." (Section 8(b)(B).)

With respect to the status of an employee so "restored" to "such position," the section goes on to say:

> "Any person who is restored to a position in accordance with the provisions of Paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered

> by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." (Section 8(c).)

It is clear that the statute on its face does not grant any right of absolute priority or superseniority; that is, there is no specific declaration by Congress that the veteran shall be entitled to the particular job he left regardless of existing contracts or practices in respect to seniority. All that Section 8 provides is that the veteran be "restored to a position of like seniority status and pay." Instead of speaking of a preferential treatment, Congress speaks merely of "restoring" to a "position" the veteran "has left," and this "without loss" of seniority. Manifestly, the words used indicate an intention to restore to a status quo, not to confer rights in addition to those which the veteran might have had had he never left his employment or to put him in a referred position as respects his fellow workers.

The word "restore" connotes a return to a previous status; it is defined in Webster's New International Dictionary, as follows:

> "restore–To bring back to, or put back into, the former or original state; To bring back (to); as, to *restore* a person to health; to give reinstatement (to); to put (a person) again in possession (of an office or the like); to put back (into); to convey (to); as, to *restore* a king to the throne."

The following cases adopt the dictionary definition: *Bowman* v. *McLaughlin*, 45 Miss. 461; 486; *Gilwee* v. *Pabst Brewing Co.*, 193 S. W. 886, 888, 195 Mo. App. 487; *Davis* v. *First Nat. Bank of Oakland*, 229 P. 391, 395, 26 Ariz. 621; *Chicago, M. & St. P. Ry. Co.* v. *City of Milwaukee*, 72 N. W.

1118, 1123, 97 Wis. 418; *Town of Hempstead* v. *City of New York*, 65 N. Y. S. 14, 17, 52 App. Div. 182.

The use of the word "position" is equally significant, and it is extremely important to note that Congress, in indicating to what the veteran must be returned, used the word "position" rather than "job." The word "position" is not defined in the Act. Webster's New International Dictionary (Second Edition) defines "position" as follows: "Site; place; station; situation; hence *proper* place; *relative* place, situation or standing" (Emphasis supplied); it connotes a relative standing existing independently of the presence of the person in it. *Risley* v. *Bd. of Civil Service Com'rs of City of Los Angeles*, 140 P. (2d) 167, 169, 60 Cal. App. (2d) 32; *Smith* v. *School District No. 18, Pondera County, Mont.*, 139 P. 8d 518, 521.

Thus, the concept of a "position" involves a relationship as between the employer and employees and as between employees themselves, all as provided for in the existing collective bargaining agreements or practices then in effect. It is a continuous relationship which carries through periods of layoffs, illnesses and furloughs, and does not signify an actual physical employment at a particular job.

Finally the use by Congress of the negative phrase in subsection (c) of Section 8 that a veteran shall be restored "without *loss* of seniority" (emphasis supplied) would seem clearly to indicate that Congress did not intend to confer any additional or superseniority rights.

It is apparent that Congress intended not that the veteran has the right to be returned to a specific, identifiable job, but rather that the veteran be returned to the same relative position that he had with the employer when he left the employer's service to enter the Armed Forces—in other words, that Congress intended to confer a return to a job right as distinguished from return to a particu-

lar job. Under such a construction, the veteran would be preserved from any prejudice that might have resulted by reason of his induction or enlistment into the Services, and would be restored to exactly the same position that he would have occupied had he never entered the Armed Forces. The assurances contained in Section 8(c) that the veteran upon return "shall be considered as having been on furlough or leave of absence," and shall lose no seniority was clearly to safeguard any veteran returned to a position in a plant where either no collective bargaining agreement or practice conferring full seniority rights was in existence. Thus, the possibility that the term "position" if taken to mean "relative position" or to mean "job right" might operate to the veteran's disadvantage in situations where no seniority agreements or practices were in effect, is fully avoided.

It is argued that the fact that Congress, under subsection (c), has declared that the restored veteran cannot be discharged without cause for a period of one year indicates that Congress did intend to put the veteran in a preferred position and to confer upon him rights in addition to those he would have had had he never left employment to enter the service. It is a sufficient answer to point out that, if freedom from fear of discharge without cause for a period of one year is an additional right conferred upon veterans, such additional right has specifically been spelled out, while superseniority is not. However, the provision that veterans shall not be discharged without cause for a period of one year, instead of comprising some sort of an additional right, might very well be considered as a means utilized by Congress to prevent circumvention of the primary purpose of Section 8 to restore the veteran to his previous position. Without a provision forbidding discharges, the whole purpose of Section 8 could be defeated by an employer rehiring a veteran one day and discharging

him the next. In any event, the provision against discharges is not at all inconsistent with a restoration to a relative, as distinguished from a super, seniority. Opposing counsel argued that the provision against discharge is clear proof that superseniority must be conferred because ordinary seniority would conflict with the discharge provision in case of layoff in order of seniority. But this argument assumes that discharge is tantamount to layoff, and ignores the distinction between the two, "clearly understood and carefully guarded in industry." See "Veterans' Reemployment Rights," 54 Yale Law Journal 417, at 425.

2. The Legislative History

The legislative history of the Selective Training and Service Act, both as recorded in the Congressional debates and in the House and Senate Reports, discloses not one single reference to any intention on the part of Congress to grant any rights of superseniority or to place the returning veteran in a preferred position as compared to his fellow workers. The original Selective Service Bill, introduced by Senator Burke of Nebraska as S. 4164 on June 20, 1940, and by Representative Wadsworth of New York as H. R. 10132 on June 21, 1940, contained no reemployment provisions. Provisions similar to Section 8 were incorporated in the Senate Bill (S. 4164) and subsequently in the final version, H. R. 6215, but little if any consideration was given to such provisions in the Committee. (See Hearings before Committee on Military Affairs on S. 4164, 76 Cong., 3rd Sess., 1940, and Hearings before Committee on Military Affairs on H. R. 10132, 76th Cong., 3rd Sess., 1940.) The reports and the debates, however, did indicate that Congress intended a restoration to the *status quo*—that the veteran should be restored to his position without in any way being penalized by reason of his military serv-

ice. The following excerpts from the Congressional discussion of the legislation are illuminating:

Sen. Danaher: 'Is it meant • • • that if a man goes out to serve his country • • • and comes back he assumes his prior status less one year's payment?'

Sen. Sheppard: 'That is what this bill intends as I understand. That is what the members of the committee thought should be and could be done.' (86 Cong. Rec. 10107 (1940). See also statement of William Green, president, AFL, quoted in 86 Cong. Rec. 10091-2 (1940).)

Chairman May of the House Military Affairs Committee stated:

> "You will find in that amendment Nos. 12, 13 and 14, the House inserted the word 'seniority' relating to a position held by the guardsmen. It is inserted in three places and provides that he shall be restored to his seniority status. In other words, if a man who is a Civil Service employee in the Government of the United States and is called into service, he shall be restored on his return to the senior position he held before he left without losing that seniority position. Likewise, with a railroad employee, under a system of seniority rights on the railroad that gives the older men in the service priority over the others, that man when he returns shall be restored to his seniority position." (86 Cong. Rec. 10761.)

Subsection (c) was also amended in order to ensure that the seniority rights of the men to be inducted were adequately protected. It was changed to read as follows, the *italicized* portions indicating the added language:

> " 'Any person who is restored to a position in accordance with the provisions of Paragraphs (A) or (B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces*, shall

be so restored without loss of seniority, *shall be entitled to participate* in insurance or other benefits offered by *the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces*, and shall not be discharged from such position without cause within one year after such restoration.' "

The purpose of this change was explained by Representative May, speaking for the House Committee on Military Affairs which added the amendment, as follows:

> "I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement." (86 Cong. Rec. 11762.)

Senator Sheppard, who spoke for the amendment in the Senate, likewise indicated that the change was intended to restore the veteran to the same position he would have been in had he been on furlough or on leave of absence. He said:

> "That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life. It seems to me a good suggestion." (86 Cong. Rec. 10914.)

Senator Barkley, the majority leader of the Senate, in discussing the effect of Section 8 in a case where there is a reduction in force, stated that

> "They might even have fewer regular employees at the end of the year than they had at the time the individual employees entered the service; and

in cases of that sort it seems to me we could not require a company to restore the employment of men, who, if there had been no military service, might have been discharged during the year because of a necessary reduction of the company's force." (86 Cong. Rec. 10108.)

President Roosevelt, whose signature made the Selective Service Act into law, likewise showed a clear understanding that Section 8 was not intended to impose any superseniority rights upon veterans but, on the contrary, seniority practices prevalent in industry were to be preserved and respected. In a statement released on December 8, 1942, he urged employers to preserve the seniority rights of employees shifting to work in war plants. In part that statement read:

"Many workers have over the years accumulated valuable rights to their jobs. Seniority privileges have become an institution in American industry.

"*This was recognized when the Selective Service Act was passed.* It was thought by the Congress only fair that men who gave up their jobs to enter the Army and Navy should have the maximum protection so that when they returned they could step back into their jobs with a minimum of loss. Valuable reemployment and seniority rights are protected under the Selective Service Act. I think *the same protection* should be accorded to a worker wherever possible who leaves his job to accept employment to help with the war effort * * *. I feel that employers in civilian industries will be willing to give the *same assurances to their employees who leave for war work as they are giving to employees who are leaving to join the Armed Services.* (Emphasis supplied.)

It is further greatly significant that the Selective Training and Service Act was passed in time of peace when it was believed that relatively few men would be inducted under it.

and that those who would be inducted would serve only a single year of "precautionary" military training. Thus, the Act was one designed to provide for a uniform and democratic form of conscription and to afford protections against the loss of rights and benefits that would otherwise have existed; the Congress which passed the Act was far more interested in mobilization than in questions which would arise after the war if there was to be a war. It was not the purpose of the Act to reward veterans for their services to their country. This latter object was accomplished under the G. I. Bill of Rights (World War II Servicemen's Readjustment Benefits Act, 38 U. S. C. A. 693, *et seq.*). Since it was through the G. I. Bill of Rights that Congress undertook to compensate veterans for their services to their country, and since the G. I. Bill of Rights does not confer superseniority, it must be concluded that Congress did not intend to confer that preferred status upon veterans at all.

Finally, it is relevant to observe that analogous British and Canadian reemployment statutes do not confer any rights of superseniority but contemplate only a restoration to a *status quo* under existing seniority practices. The British statute provides that

> "it shall not be treated * * * as reasonable or practicable for the former employer to take the applicant into his employment * * * if it can only be done by discharging some other person who * * * had been * * * employed * * * for a longer period than the applicant. (Reinstatement in Civil Employment Act, 1944, 7 & 8 Geo. VI, c. 15, Sec. 5.)

The Canadian Reemployment Act makes "the right to reinstatement * * * subject to established rules of seniority in the employer's establishment * * *" Reinstatement in Civil Employment Act, 1942, 6 Geo. VI, c. 31, Sec. 3.)

3. The Results Obtainable Under the Government's Construction

To hold that Section 8 confers rights of superseniority upon returning veterans not only would do violence to the plain language of Section 8, but it would impute to Congress an intent to destroy common law rights and to bring about preposterous and grossly inequitable results. Surely, it cannot be concluded that Congress desired to produce such results in the absence of specific language leaving room for no alternative conclusion; it is a well-accepted principle of statutory construction that enactments in derogation of common law rights or productive of harsh or inequitable results must be specific to that end before an intent to accomplish such results can be imputed. Accordingly, a consideration of the consequences that would ensue were the superseniority interpretation to be given effect is relevant to the question of what must have been the intent of Congress under Section 8.

(a) In the absence of express language Congress cannot be presumed to seek to abrogate standard provisions in respect to seniority rights appearing in perhaps 95% of collective bargaining agreements throughout the country, assuming always, of course, that such seniority provisions confer benefits no less than those specified under Section 8(c) of the Act. If the superseniority construction is given effect, it will mean a scrapping of seniority relationships in industry built up over a period of many years; it will mean the wrecking of every workingman's—whether veteran or non-veteran—most dearly prized right. To millions of workers' rights of seniority by length of service, whether set forth in formal agreements or established as industry practice, represent the very essence of job security. An authoritative study of seniority by the United States De-

partment of Labor (Seniority Provisions in Union Agreements, Monthly Labor Review, May 1941, p. 1167, *et seq.*) has very aptly summed up the development and the importance of the seniority principle in American industry.

"Seniority early became a major issue among the skilled workers on the railroads, where employment ance with length of service. The principal aim of a seniority program is to afford the maximum security and reward to those who have rendered longest service. Also, a definitely established seniority program provides an objective standard of selection thus eliminating favoritism and discrimination in various phases of the employment relation.

"Seniority early became a major issued among the skilled workers on the railroads, whose employment tenure was broken up by frequent transfers and lay-offs caused by consolidation and technological improvements. To overcome complaints of favoritism and discrimination, one of the first demands of the unions, after collective bargaining was established, was the institution of a system of straight seniority in transfer, lay-off, and promotion. The printing-trades unions also were among the first to urge the recognition of seniority, and 'priority rights' were adopted whenever the unions became strongly established * * *

"The growth of mass-production industries and increased union organization during the last few years has made the question of seniority one of the dominant issues in industrial relations. In these industries seasonal fluctuations in production mean frequent lay-offs. Since the great majority of the jobs are semi-skilled or unskilled, most of the workers can be easily replaced, thus increasing the feeling of insecurity. The emphasis on youth and speed in these industries also has tended to cause a feeling of uncertainty of tenure on the part of the older wo. ers * * *

"In spite of these very real problems, both employers and unions have found that the recognition of seniority has distinct advantages. It prevents discriminatory

firing as well as favoritism in promotions. It reduces the number of voluntary quits, since a worker not only hesitates to lose accumulated seniority but also finds it harder to secure employment in another plant where workers have established seniority rights. Although seniority does not eliminate the hazards of unemployment during seasonal decline or cyclical depressions, a measure of job security is obtained. Since a large portion of the working force has reasonable assurance of reemployment at the end of short lay-off periods, they are relieved of the necessity of seeking employment elsewhere. Employers thereby have assurance that a large proportion of their experienced workers will return as soon as business improves. Of major importance is the improved morale resulting from an orderly procedure, carefully planned in advance, and known to all concerned."

The maintenance of a functioning seniority system in a particular industry is indispensable to the peaceful and harmonious functioning of that industry, and any departure from or abrogation of established seniority principles will inevitably operate to the prejudice not only of non-veterans but of the veterans themselves by interfering with the orderly employment of veterans and the preservation of seniority rights indefinitely in the future once they have been employed. The principle of seniority has brought about an orderly reemployment system in American industry. The superseniority interpretation will impair the ability of the veterans to secure speedy reemployment, and in the end the superseniority principle will undoubtedly do the veteran more harm than good by destroying the very system which is the foundation of all job security.

At least two national Veterans' organizations—the Veterans of Foreign Wars and the Disabled Veterans—recognized that in the long run superseniority would harm the veterans more than it would benefit them. Omar V.

Ketchum, National Legislative Representative and Rehabilitation Director of the Veterans of Foreign Wars, in an interview published in "Labor," organ of the Railway Brotherhoods, issue of August 26, 1944, stated as follows:

> "On its face that rule may seem to give a lot of security to servicemen. Actually it's a gold brick. For one thing, it may lead to the dismissal of veterans of the first World War to make room for those of this war. It may lead to fathers being laid off to make room for sons.
>
> "What's most serious is that the ruling would wreck existing union seniority systems—and in the end veterans would thus be left with practically no protection at all.
>
> "The best and fairest method is that provided for in union contracts—under which returning soldiers regain their former seniority, plus accumulated seniority for the time they were in uniform. That means a square deal all around."

In determining whether Congress could be presumed thus to destroy rights of seniority by implication, it is further relevant to note that seniority rights have been held to be property rights in numerous cases. *Evans* v. *Louisville & N. R. R.*, 191 Ga. 395, 12 S. E. (2d) 611 (1940); *Bradford* v. *Kurn & Lonsdale*, 235 Mo. App. 1282, 146 S. W. (2d) 644 (1940) (failure of trustees in bankruptcy to recall a laid-off employee in accordance with contractual seniority rights gives employee a cause of action); *Ledford* v. *Chicago, M., St. P. & Pac. R. R.*, 298 Ill. App. 298, 18 N. E. (2d) 568 (1939); *Gleason* v. *Thomas*, 117 W. Va. 550, 186 S. E. 304 (1936); *Grand International Brotherhood* v. *Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934). See also *Griffin* v. *Chicago Union Station*, 13 Fed. Supp. 722; *Nord* v. *Griffin*, 86 Fed. (2d) 481; *Estes* v. *Union Terminal Co.*, 89 Fed. (2d) 768. If, as has been held by many court decisions, seniority rights

constitute property rights, such rights cannot be abrogated by implication; the law of statutory construction requires specific language to accomplish results in derogation of common law rights—language completely absent from Section 8.

(b) Congress cannot be presumed to desire to create situations which are contrary to all principles of equity and fair play. The test suit instituted by the American Federation of Labor in Illinois (*Olin Industries, Inc.*, v. *Joseph Barnett, et al.*) involved concrete situations which are illustrative of results which will commonly ensue if the interpretations sought by counsel for the veteran herein is adopted. In the *Olin* case Slader, an employee with 32 years' service with the Company, working faithfully through good times and bad, would be displaced by Bond, a man with three years' service with the Company and employed only during a period of war expansion. Reed who served as Coontz's supervisor, and who taught him his trade, would be displaced by Coontz, even though Coontz has lesser seniority than Reed. Or, to refer to an almost classic example of what will result if superseniority rights are granted, in a plant in New Jersey a wounded veteran of World War I, with thirty years of company service and with a large family, was actually displaced by a Wac who served four months with the Company and three months with the army before she procured a medical discharge. Examples such as these of what would happen were the superseniority principle to be adopted could be multiplied indefinitely; on the other hand, results inequitable to the returning veterans would be few and far between were the principle of equal seniority to govern. Indeed, since in no case could a returning veteran be displaced by some one hired subsequent to the time such veteran entered the Armed Services, and in all cases the

veteran would be accorded credit for all time spent in the Services, it is difficult to see where any inequities would result to the veteran. But be that as it may, it is certain that under a superseniority interpretation, those displaced will be the older employees who for the most part have families to support and have acquired responsibilities considerably greater than the younger veterans. It is precisely these older, less adaptable employees who will find it more difficult than a younger man to make adjustments. In many cases the persons displaced would be veterans of World War I. The mere lapse of time since they made their sacrifices in the national interest—sacrifices equal to those of persons on active military and naval duty in this war—should not be allowed to wipe out their country's debt to them. Wives and parents of soldiers and sailors of this war would also be among those whose seniority rights would be destroyed. The worker who sought to enter the armed forces but was deferred against his will because his services were more valuable to the war effort on the production line will have lost not only his chance to don a uniform but his job as well. All these and many others with equally valid claims to recognition of their seniority rights will be relegated to the status of second-class industrial citizens. Did Congress intend that these employees with long years of service and with family responsibilities are to be uprooted from their jobs and perhaps from the community? In the absence of express language unavoidably producing this result, it can hardly be concluded that Congress did so intend.

Absolute priority will inevitably have a divisive effect by pitting veteran against non-veteran for the available job opportunities. Seniority is one of the worker's most dearly prized rights and they will fight hard to preserve it. It would be unfortunate indeed if, to the inevitable difficulties

of reconversion, there were to be added an economic struggle between veterans and non-veterans.

(c) However great might be the wishes and desires of Congress to give the returning veterans every possible compensation and advantage in return for the inestimable sacrifices made in serving their country in time of war, it cannot be presumed that Congress would intend to give these compensations and advantages at the cost, not of the general public, but of a limited class of private individuals, namely, the older worker who, through no fault of his own, remained on the job at home. It is to be remembered that many war workers attempted to enter the Services, but were told by their Selective Service Boards that they could do more for their country by remaining on the job. In any event, under the workings of the Selective Service System, it cannot be said that any person deemed by this country necessary to be included among the fighting forces was not so included. No reasonable person can deny that returning veterans are entitled to every possible consideration and advantage upon their return to civil life, including, if need be, freedom from economic competition for a period of one year. However, no reasonable person can insist that the burden of thus compensating the returning veteran should be borne only by a limited class of private individuals, namely, those war workers who will be displaced if the veteran is given an absolute right to a job for a period of one year. Surely, anything that it might cost to grant the veterans all possible benefits and advantages should be shared by all of the people of this country. That is the traditional way of American democracy, and it cannot be assumed that Congress would intend any method of compensation the cost of which would not be shared by all alike.

(d) It cannot be presumed that Congress would seek to disrupt our domestic economy and seriously interrupt the reconversion program by requiring industrial organizations to displace their trained and proven workers with those who were for the most part newly hired, and who for the most part are unskilled and untrained. Most business organizations have spent years in building up staffs of efficient, skilled workers, and are dependent upon these staffs to fill their production schedules. The superseniority interpretation would require displacement, in some instances (of which the *Olin Industries* case, in which the number of workers employed during the war expansion period greatly exceeded the peacetime complement, is an excellent example) of all of a skilled staff which has faithfully served through many years of peacetime production and upon which the employer has become entirely dependent. Such a total or near total displacement would, of course, entirely destroy the efficient operations of any enterprises, and even a partial displacement would seriously disrupt production. Further disruptions to production can be anticipated when displacements of older employees become wholesale, or in instances of extreme inequity such as that involving the Wac and the veteran of the First World War. In such cases strikes will be all but unavoidable.

It is not possible to deny that adoption of the superseniority principle is fraught with danger of extremely undesirable consequences, consequences which Congress cannot be said to have intended. Representatives of industry and of management have on many occasions announced their opposition to the superseniority principle. See Factory Management and Maintenance (a McGraw-Hill publication) article entitled "Seniority: A Memo to Government", May 1944 issue; N. Y. Journal of Commerce,

Sept. 20, 1944, p. 1, col. 2; "New Laws Need to Define Rights of War Veterans," id., October 7, 1944, p. 1, col. 6; "Reemployment of Veterans" (Industrial Relations Counselors, Monograph No. 68, 1944) 10; "Survey Shows That Post-war Employment for Returning Soldiers is the Major Problem of Industry", (May 1944) 154 Iron Age 87; "Seniority Bonus", Business Week, Jan. 15, 1944, p. 90; "Reemployment of Veterans: With a Paper on Manpower Outlook" (American Management Association, Personnel Series No. 76, 1944); "Report on Reemployment of Ex-Servicemen and Women", A. A. R. Comm. for Study of Transportation, June 1944); Post, "The Veterans' Problem: A Challenge and an Opportunity" (Nov. 1944) 21 Personnel 126. Many of the current objections to the ambiguities of Section 8 were anticipated in a memorandum of the NAM during the hearings on the Selective Service Bill. Appendix to Hearings before Committee on Military Affairs on H. R. 10132, 76th Cong., 3d Sess. (1940) 632-3. Three months before the promulgation of Memorandum 190-A, the War Labor Board's Shipbuilding Commission refused a union request for a contract provision that veterans whose former jobs were not available should be placed in jobs as nearly comparable as possible, in part on the ground that such a clause would lead to a mass reinstatement of men whose lack of aptitude might seriously impair productive efficiency. *Sullivan Drydock and Repair Co.*, 14 War Lab. Rep. 284 (1944). In a study by a group of economists at Princeton University, entitled "Seniority Problems During Demobilization and Reconversion", Princeton University, Princeton, 1944, the same conclusion was reached:

> "If this notion prevails, many mature and competent employees will lose their positions by legal fiat. It is questionable whether the veteran group, as a whole,

will gain as much in security as the wage earners they displace will lose."

The McGraw-Hill article, above, stated as follows:

"Government can remove a big 'if' from the postwar reemployment problem by setting industry straight on certain points concerning veterans and seniority. It may be assumed that a veteran who returns to his employer with a halfway good claim to a job will be rehired, seniority or no. Still, many companies are relying on seniority to help them preserve basic peacetime working forces * * * and some managements find it hard to believe that any law will ask them to sweep civilians out wholesale to make room for veterans. So here are the questions: Will seniority prove a workable measure of the relative claims to jobs? Or is it a dead issue right now? Also, what is a 'temporary' employee? Industry needs the answers. Government alone can supply them.

* * * * * * *

"Some managements find it difficult to believe that any law will ask them to sweep civilians out of their plants wholesale to make room for veterans. Some companies are relying on seniority to help them preserve their basic peacetime working forces which naturally are composed pretty largely of prewar civilian employees. One example is a company which had 800 employees before the war, has 1700 now, expects to employ 800 after the war, and has 800 service stars in its flag. Obviously something's going to have to give.

" 'If all 800 of our veterans come back, the law will have to tell us what to do,' says the management. 'We should like the law to say that seniority will be the determining factor, but, if it doesn't, we shall need a definite statement of policy from government.' "

In the article appearing in the Journal of Commerce, above, it was stated:

> "Doubts concerning the workability of the policy of Selective Service in granting super-seniority to returning war veterans, under the re-employment provisions of the Selective Training and Service Act, are being expressed by industrialists, it was learned yesterday.
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> * * * * * * *
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> "In some industries, however, application of the super-seniority rule will deprive employers of the service of many skilled workers, for want of whom reconversion and re-employment may be retarded, it is pointed out. This is particularly true of industries in which employment has greatly increased during the war, such as aviation, shipbuilding, and machinery manufacturing. In some cases, the number of returning veterans will be far greater than the normal peacetime employment of individual companies."

4. Applicable Decisions

The briefs filed by the parties to this cause have adequately discussed the applicable court decisions. The attention of this Court is particularly directed to the very well-reasoned decision of Judge Briggle in *Olin Industries, Inc.*, v. *Joseph Barnett, et al., supra.* That decision, together with that of Justice Learned Hand in the instant case, fully disposes of the various contentions made by the Government herein, and is completely persuasive of the validity of the construction of Section 8 contended for by the American Federation of Labor and the appellees herein.

In addition, the Court is respectfully referred to a very illuminating article on the entire matter in controversy in

this case, appearing in 54 Yale Law Journal at page 417, entitled "Veterans' Reemployment Rights Under Selective Service Interpretations."

Finally, the Court is respectfully referred to the determinations of three different arbitration tribunals, composed of men familiar with the problem of labor and industry, rejecting the superseniority construction of General Hershey. These cases are *In the Matter of Timken Roller Bearing Co.*, 16 L. R. R. 158; *In the Matter of Sullivan Dry Dock & Repair Corporation*, 17 L. R. R. 7; and *In the Matter of Dow Chemical Co.*, 17 L. R. R. 646. The reasoning and logic of these aribtration decisions are extremely convincing and fully support the position taken by the appellees herein and the American Federation of Labor.

Conclusion

A recent book by Mr. Aaron Levenstein of the staff of the Research Institute of America, entitled "Labor Today and Tomorrow," Alfred A. Knopf, published 1945, succinctly sums up the superseniority issue as follows (p. 226):

> "As written by Congress, the reemployment law was intended to assure the veteran that he would get his own job back; as interpreted by Selective Service, the veteran would be given someone else's job. The veteran would walk into the plant, and the worker who had been there years before would have to walk out. The result would be to put the burden of reemploying veterans on those least able to carry it, the individual workers—not government or industry. As the American Veterans of World War II expressed it, Selective Service would 'rob Peter to pay Paul.' "

It is respectfully submitted that the construction of Section 8 contended for by the appellees herein and the American Federation of Labor is one consistent with the language of the Act, consistent with its legislative history and

consistent with principles of justice and fair play, both as regards returning veterans, non-veteran workers, and employers.

Respectfully submitted,

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